MEASURE OF DAMAGES WHEN PROPERTY IS WRONGFULLY TAKEN BY A PRIVATE INDIVIDUAL.

WHERE chattels, or land, are not destroyed, nor taken by condemnation proceedings, but are taken by a private person, what shall be the measure of damages for the loss? Shall it be the value as of the time of taking or of the time of demand? Shall it be the same whether the injury is caused innocently or knowingly? Shall the loss always be measured by compensatory damages, or shall exemplary damages sometimes be allowed? These are some of the questions that come flocking to meet one as he enters this interesting field of legal thought.

The loss may be occasioned in any one of three different ways: A person may appropriate another's chattels, or sever a part of his land and appropriate it as chattels, either inadvertently or knowingly but not maliciously, or maliciously. The party injured may seek his redress through an action in replevin, or conversion, or trespass. So that the question of the measure of damages for the wrongful taking of one's property arises in nine different ways.

If a person injured elects to sue in trespass, he may recover exemplary damages, if the act is wanton, or malicious; the diminished value of his land, that is the value in place of the articles removed together with any injury to the freehold by reason of the removal, if there is a wrongful entry on his land; and the actual value to him of the things taken, if they have no market value; but, in this form of action, he may also recover for any enhanced value given to the chattels by the labor of the wrongdoer, if not through inadvertence.[1]

If the person injured sues in conversion, or trover, exemplary damages are recoverable as in the case of a suit in trespass if the act is malicious; the enhanced value given to the chattels by the labor of the wrongdoer, if the act is done knowingly; but only the value at the time of taking, or after severance in case of severance from realty (though some cases hold that the value should be

[1] Engle *v.* Jones, 51 Mo. 316; Brown *v.* Allen, 35 Ia. 306; cases *infra.*

before severance, or in place), with interest, if the taking is inadvertent and innocent.[1]

If the person injured prefers to sue in replevin, he is entitled in the alternative, either to damages, as in the case of conversion, or the return of the chattels, whether taken knowingly or inadvertently, unless the advertent wrongdoer changes them in species, or so increases them in value that the original chattels are mere accessories and the new value is out of all proportion to the original, or confuses them with other goods of unequal grade, but if he requires the return of chattels taken by an innocent wrongdoer, or by an innocent purchaser from an intentional wrongdoer, in either case he is required to compensate such innocent party for the enhanced value given by him.[2]

These propositions, which are generally adhered to, suggest a number of questions, and the first is regarding exemplary damages. These are not allowed on any theory of compensation to the injured party, but rather for the purpose of punishing the wrongdoer and as a warning to others. Do such damages have any place in civil actions? The writer thinks not. This question has been so often discussed that it is becoming somewhat threadbare, and it is not his purpose to enter into any extended treatment of the same, but merely to give a sort of summary of the arguments against the awarding of exemplary damages, especially for violation of property rights. There are two kinds of wrongs, public and private, the former violating the rights which inhere in the people as a whole, and the latter the rights which belong to some individual. The remedy for the violation of a public right is criminal punishment, of a private right, redress, which can be accomplished either by the restoration of that of which a person has been deprived, or by awarding him compensation therefor. The early idea of private vengeance has been supplanted by the criminal law, so that there is no longer any place for it in civil law, and place cannot be made for it by talking about punishing a person for the public and for the sufferer in the right of the public. The allowance of exem-

[1] White *et al v.* Yawkey, 108 Ala. 270; Beede *v.* Lamprey, 64 N. H. 510; Gaskins *v.* Davis, 115 N. C. 85; Eaton *v.* Langley, 65 Ark. 448; Wooden Ware Co. *v.* United States, 106 U. S. 432; Forsyth *v.* Wells, 41 Pa. St. 291; McLean Co. Coal Co. *v.* Long, 81 Ill. 359; Single *v.* Schneider, 24 Wis. 299; Winchester *v.* Craig, 33 Mich. 205; Tuttle *v.* White, 46 Mich. 485; Nesbitt *v.* St. Paul Lbr. Co., 21 Minn. 491.

[2] Silsbury *v.* McCoon, 3 N. Y. 379; Wetherbee *v.* Green, 22 Mich. 311; Pratt *v.* Bryant, 20 Vt. 333; State *v.* Shevlin-Carpenter Co., 62 Minn. 99; Eaton *v.* Langley, 65 Ark. 448.

plary damages puts a man in jeopardy twice for the same offense, contrary to provisions in State and Federal constitutions, for, though the same wrong is inflicted, the fine awarded as punishment in the civil action does not prevent indictment and prosecution in a criminal action, and punishment in a criminal suit is not admissible in mitigation of exemplary damages. The purpose of these provisions is to prevent double prosecutions for the same offense, and when, in addition to the civil wrong, the same act is split up into two further offenses criminal in nature, whether one is called private and the other public, or both are called public, this purpose is violated, and the accused is harassed with two prosecutions. No hypothesis, however ingenious, can cloud the mind to the fact that exemplary damages put a man in jeopardy once, and, if he is also punished criminally for the same offense, he is "twice put in jeopardy." Again, when assessed exemplary damages, the accused is really punished for a criminal offense without the safeguards of a criminal trial. He is summoned into court to make compensation for a purely private injury, with no issue upon a criminal charge presented; punishment by fine is inflicted without indictment or sworn information; the rules of evidence as to criminal trials are rejected; the doctrine of reasonable doubt is replaced by the rule of preponderance of evidence; the defendant is compelled to testify against himself; and, though in criminal offenses the law fixes a maximum penalty which is imposed by the court, the jury is entirely free to assess exemplary damages, subject only to the power of the court, unwillingly exercised, to set aside the verdict. The procedure and principles of criminal law are disregarded, the rules of damages are forgotten, and the machinery of justice is used for the avowed purpose of giving the plaintiff that to which he has no shadow of right. He recovers compensation for all direct and consequential injuries resulting from a breach of contract or a tort; for the loss of property, of time, of earning capacity, of profits, of reputation, of services and society, for expenses, for physical pain, for mental suffering, for injuries to result in the future as well as those which have already flowed from the wrong; and then, in addition to all this, after exact justice has been meted out between the contending litigants so far as it is possible to do so, he is allowed to recover exemplary damages, not for any injury he has sustained, but as a punishment to the wrongdoer and as an example to others. The doctrine is altogether inconsistent with sound legal principles and it is unfortunate that it ever found lodg-

ment in the law, and we look with admiration upon any court brave enough to disown and abandon it.[1]

Passing by the cases of malicious injury, as only involving exemplary damages, we come to suits in trespass, conversion and replevin, both where the injury is caused knowingly but not maliciously and where it is caused inadvertently, and the first question to suggest itself here is whether there should be any difference in the measure of damages in the different cases.

Before proceeding further, we should note that in these cases the question of the allowance of exemplary damages does not arise, for there is lacking that malicious, or wanton, or reckless conduct necessary to warrant the punishment of the offender, even where the doctrine of exemplary damages prevails. It is true that this distinction is not always noticed. The Supreme Court of Minnesota[2] and other courts have given as a reason why a wilful wrongdoer has to pay greater compensation than an innocent is because "he is entitled to no consideration, and it is just, as a punishment to him and a warning to others, that the full penalty be visited upon him, although the plaintiff gains thereby." But this announces a wrong principle. Conduct must be more vindictive than this before any court can allow exemplary damages. Here the measure of damages is determined by the court, exemplary damages are determined by the jury. Here the damages are awarded as a matter of right, exemplary damages are awarded as a matter of discretion. Whatever damages are recoverable for either the inadvertently, or the knowingly but not maliciously, taking of another's property are compensatory in character.

Can a difference in the measure of damages be predicated on the nature of the action or the fact of knowledge on the part of the wrongdoer? For any legal injury he has sustained, the party injured is entitled to just compensation, and no more. He is entitled to be placed in the same situation, so far as money can do so, as though no wrong had been committed. He has a right to be made whole again. To give him any less than this still leaves him an injured party; there is some injury not redressed. But, to give him any more than this, instead of exactly redressing his injury, causes a new injury to the first wrongdoer, who is now the injured party. Hence, no matter what the form of the action, the object is the same, and a different rule of damages should not and does

[1] 8 Eng. Rul. Cas. 360–382; 1 L. R. A. Dig. 933–937.

[2] State v. Shevlin-Carpenter Co., 62 Minn. 99.

not prevail, in trespass, conversion and replevin, except when circumstances of aggravation are relied upon. Unless vindictive damages are sought a person is restricted to compensation for his pecuniary loss. There is no reason or principle why for the same injury the measure of damages should be different in one form of tort action than in another; the loss is the same, and the redress should be the same; to hold otherwise is to permit the form of the action rather than the actual injury, to fix the damages. That a person sometimes recovers more in trespass than in conversion is due to the fact that he is suing for a different injury, or injuries. For example, he may sue in trespass for injuries to chattels and land, but if he sues in conversion or replevin he sues only for the injuries to the chattels. There is as little foundation for a distinction between a case where an injury is caused knowingly, but not in such a way as to call forth exemplary damages, and a case where it is caused inadvertently. A man is damaged just as much whether the injury is caused by mistake or intentionally, and whatever rule of damages is adopted in one case should be adopted in the other. A, innocently, and B, intentionally, trespass upon C's land and cut some of his timber, each cutting the same quantity and grade. A has caused C just as great an injury as has B. A and B each transports to distant markets the timber which he has cut and works it up into lumber, the value of the lumber which A holds being identical with the value of that B holds. B has now caused C no greater loss than has A. There should be no difference in the measure of damages because either of the form of the action, or because of the intent with which the wrongful act is done.

At last we are ready for the question, What shall be the measure of damages? Shall it be the value at the time of taking, or the enhanced value? Having decided that the rule should not vary with the form of the action nor the intent of the wrongdoer, the next and most difficult question which arises is the determination of what that rule shall be. The true measure of damages for an injury of this sort is the enhanced value at the time of demand, or suit. At the time of the taking the owner has not sustained all the injury that it is possible for him to sustain from the loss of his chattels, nor is that all the injury which the wrongdoer causes him, so that the injured party is entitled only to compensation for the injury caused by the taking with interest on that amount to the time of trial. His title and right to the possession of the property

continue. He does not have to consider it converted unless he so desires. He has a right to treat it as converted at any time between the time of taking and the commencement of the action. The title can be changed only by an agreement of the parties, or a satisfaction of a judgment, except where an innocent party changes the identity of the chattels, or so increases their value that it is out of all proportion to the original value. Hence the injured party is entitled at any time, before the running of the statute of limitations, to the return of his property or to its value. This the cases all hold, in the case of an intentional wrongdoer. But, apparently, this is not the general holding of the courts in the case of an inadvertent wrongdoer. It is the object of this article to show that the courts either do not or ought not to make such a distinction. It is hoped that the last has already been done; it remains to explain the apparent conflict in the adjudicated cases.

The real difficulty in the situation is not seen when we look simply at the party who has lost his property; we must look at the party who has taken it, or who has purchased it from the taker. Suppose that the latter takes a colt, when it has very little value, that he feeds and cares for it two years, that he puts it into the hands of an expert trainer, until it becomes a valuable race horse, worth three thousand dollars. Suppose that a trespasser cuts timber, and mostly by his own labor and expense increases it in value three or four times. Suppose that this occurs with any one of a thousand things. Shall the one who thus enhances the value of a thing lose all the fruits of his labor? If he all the time knows that he is conferring these benefits upon another party, yes; but, if he is ignorant of this fact and is acting *bona fide* and innocently, no. The courts are right in drawing the sharp distinction which they have drawn between the cases of intentional and inadvertent trespasses, but many of them have made a mistake as to the remedy to be applied. The solution for all the difficulties here arising lies, not in announcing different rules, or measures, of damages, for the loss which the original owner has sustained, but in finding some right of action for the innocent party who has added his labor to the other's chattels. This is found in *quasi* contracts. After this enhancement in value, both parties have an interest in the property. The wrongdoer has an equitable interest in the property to the extent that he has increased its value by his labor bestowed upon it in good faith. Accordingly when sued by the original owner, whether in replevin

or in conversion, he is entitled to set up a counterclaim for the reasonable value of the benefits which he bestows upon the original owner when the latter elects to accept them by bringing suit. This is not the difference between the value of the property at the time of taking and suit, but the value of the benefits which the wrongdoer innocently bestows, not to exceed that amount. The increased value is the joint result of the original material and the work and materials expended by the laborer, with sometimes an independent cause, like a better market, contributing to the enhanced value. The wrongdoer, though innocent, is not entitled to all this: the ordinary measure of damages in *quasi* contracts is the true criterion, and the benefits for which he is entitled to recover are only those which he has added to the chattels after severance, where land is taken and converted into chattels and improved, for the trespasser has added no value to the land; he can recover for only the added value he has given the chattels. On this last point there is conflict in the English and American cases, the rule in the case of minerals severed being stated so as to include all improvements since they were in place, but it is believed that in general the rule here announced is correct.

The rule of damages adopted and applied by many of our state courts and by our United States Supreme Court is unjust and an outrage on the rights of property. By the rule of these tribunals, instead of the owner receiving the profits that are made from the objects of his ownership, the profits are given to the trespasser. This is nothing more than judicial robbery. It is allowing one man to take another's property without paying any compensation. The true rule should compensate the innocent party for the labor and expense he has bestowed upon the chattels to the extent their value is enhanced thereby, but it should give all the other advantages of ownership to the owner. Thus, if A inadvertently trespasses on B's land and cuts timber, when its value standing is three dollars a thousand and after severance four dollars a thousand, and he then transports it to his saw-mill and saws it up into boards at a total expense of five dollars a thousand, but at that time and place the value of the lumber is twenty dollars a thousand, B should be allowed to sue A in any form of action and recover either the lumber or its present value of twenty dollars, less five dollars a thousand. That is, in a suit in conversion, he should recover fifteen dollars, whereas, according to the cases criticized, he would at the most recover only four dollars a thousand, and A

would put the eleven dollars of profit into his pocket; and, though not in this ratio, this is exactly what some of our largest lumber companies have been doing for years. Adopt the rule and measure of damages here contended for and there will be less incentive to become innocent trespassers. The wrong, if any, has been caused by the courts, and it should be righted by the courts.

The only limitation upon the allowance of counter damages for benefits conferred is that the courts should exercise great caution in protecting wrongdoers, and only allow them compensation where there is the plainest case of innocence. It is an easy thing for one to claim that he has purchased property in entire good faith, and an easier thing to claim that through innocence and mistake he has unintentionally trespassed over the boundary line of his land and cut timber on another's land, especially if the land trespassed upon happens to belong to the state. There is nothing which has thrown more discredit upon the law than the spectacle given us by some of the courts sitting near the great lumber regions of our country in their endeavors to discover inadvertence in the conduct of some great lumber companies, which have grown rich upon their stealings of timber from private and state lands. But if these courts would adopt the theory herein set forth there would be less likelihood of their giving us another such a spectacle, for it is not so easy to prove a *quasi* contract as to prove inadvertence, where the latter is one's business.

By the use of this conception of *quasi* contracts, the law of damages is freed from inconsistencies; true compensation, the ambition of the law, is accomplished by one uniform perfect rule; the serfdom of form is thrown off; and at the same time complete and careful justice is awarded to all parties, innocent and wilful, sufferers and wrongdoers, owners, trespassers, and purchasers.

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